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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to the filing of this brief has been given by the Office of the Attorney General of the State of California, counsel for petitioner, and by Mr. Robert L. Walker, Esq., counsel for respondent. Letters of consent from both counsel should be on file with the Clerk of this Court.

Interest of the Amicus Curiae

The California Public Defenders Association is a nonprofit corporation, incorporated under the laws of the State of California in 1969. It was formed to assist public defender offices in California in their efforts to secure the constitutional rights of indigent defendants by vigorous and competent representation. The Association represents approximately 600 defense attorneys from 34 public defender offices throughout the State of California.

A decision by this Court in the instant case could have a substantial impact upon every minor appearing before a juvenile court in California, by subjecting him to double jeopardy, by inhibiting him from presenting a defense on the merits to an accusation of juvenile delinquency, and/or by inhibiting him from candidly discussing the facts of his case with the juvenile court judge. Accordingly, the California Public Defenders Association is filing this brief as amicus curiae pursuant to the authority of its Board of Directors and the unanimous vote of its Committee on Amicus Briefs.

I

THE CALIFORNIA CONSTITUTION INDEPENDENTLY PROTECTS MINORS APPEARING BEFORE THE JUVENILE COURT FROM DOUBLE JEOPARDY, INCLUDING MOST FORMS OF CONTINUING JEOPARDY. GIVEN THIS FACT, THE ACTUAL CASE OR CONTROVERSY PRESENTED BY THIS CASE IS AN EXCEEDINGLY NARROW ONE, MERELY ARISING FROM AN ISOLATED INCIDENCE OF DEPARTURE FROM APPROVED METHODS OF PROCEDURE.

Introduction to the First Argument

In reading the Petition for Writ of Certiorari and the Petitioner's Opening Brief, we are struck by certain apparent contradictions and shifts of position as to the nature of the questions before this Court, and their significance. Petitioner's apparent uncertainty as to these matters lead amicus to feel that some further discussion of, one, what questions are properly before the Court in this case; and, two, the actual significance of those questions, would be useful.

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At page 12 of the Petition for Certiorari,[1] petitioners seem to suggest--perhaps in response to the broadness of some of the language in the Ninth Circuit's opinion--that this case should be used as a vehicle for an overall redefinition of the concept of double jeopardy, at least as it relates to juvenile cases. At pages 14-21 of the Petitioner's Opening Brief, however, it is conceded that the broad question of the application of the federal bar against double jeopardy to California proceedings is not properly before the Court. We agree with petitioner in this respect.

In the following paragraphs, we shall set out, in detail somewhat greater than that afforded by petitioners the nature of the State decisions in this area.

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(1)". . . This Court has recognized that 'a concept of continuing jeopardy has application where criminal proceedings against an accused have not run their full course.' Price v. Georgia, 398 U.S. 326 (1970). Although the Court below would narrowly confine that concept to retrials which follow appellate reversals of criminal convictions this Court has never intimated that continuing jeopardy is limited to that context."

After devoting some incidental discussion to the historical underpinnings of those decisions, we shall demonstrate how they operate to severely narrow the question which this case presents for review. We shall conclude the argument by discussing briefly our views as to the proper resolution of the narrow question thus remaining, proceeding finally to comment upon the practical impact which a decision of that question by this Court might have.

A. Minors Facing Juvenile Proceedings are Independently Protected From Double Jeopardy, Including Most Forms of "Continuing" Jeopardy, by the California State Constitution.

Article I, Section 13, Clause 4 of the California Constitution (West 1974) provides, "No person shall be twice put in jeopardy for the same offense." In the case of Richard M. v. Superior Court, 4 Cal.3d 370, 93 Cal.Rptr. 752, 482 P.2d 664 (1971), the California Supreme Court, in a unanimous opinion, gave effect to this provision with the following language:

> "In proceedings before the Juvenile Court, juveniles are entitled to Constitutional protections against twice being placed in jeopardy for the same offense (U.S. Const. Amends. V, XIV; Cal. Const. Art.I §13 . . .)." 4 Cal.3d at 375, 93 Cal.Rptr. at 756, 482 P.2d at 668.

Drawing an analogy to bench trials in criminal cases, the California court went on to conclude that jeopardy attaches in a juvenile proceeding at the time trial on the merits is "entered upon". 4 Cal.3d at 376, 93 Cal.Rptr. at 756-757, 482 P.2d at 668-669.(2)

The Richard M. case, supra., involved an attempt by the juvenile court to retry a minor which it had already tried and acquitted. Approximately two years later, the California court resolved, in the negative, any remaining doubts as to whether its construction of the independent

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(2) In Bryan v. Superior Court, 7 Cal.3d 575, 581, 102 Cal.Rptr. 831, 835, 498 P.2d 1079, 1083 (1972), the California court emphasized the dual grounds of the Richard M. decision by characterizing it as having been based upon the dual bars to double jeopardy found in both state and federal constitutions.

state and federal prohibitions against double jeopardy would permit application of a general concept of "continuing" jeopardy to juvenile proceedings.

In In re James M., 9 Cal.3d 517, 108 Cal.Rptr. 89, 510 P.2d 33, a juvenile had been accused of felonious assault upon a police officer.(3) The juvenile court evidently was unable to conclude that the charged offense had taken place; nevertheless, over the juvenile's objection, it convicted him of "attempted assault!" On appeal, the State assumed that there was no crime of "attempted assault" under California law, but asked that the matter be remanded to the juvenile court for a second trial at which the juvenile could be found guilty of the completed charge of assault.

The State Supreme Court, after holding that there was indeed no crime of "attempted assault" in California, reversed with directions to dismiss the case entirely. In rejecting the State's argument, the Court stated, again unanimously,

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(3)California Penal Code Section 245, Subdivision (b).

"The trial court's finding that James was guilty of only attempted assault . . . . constituted an implied acquittal of the charged assault itself. He could not be tried again for an offense of which he had been acquitted. Protection against double jeopardy applies to juvenile offenders as well as to adults. (U.S. Const., 5th Amend.; Cal.Const. Art. I, Sec. 13.)" 9 Cal.3d at 520, 108 Cal.Rptr. at 91, 510 P.2d at 35.

While the James M. decision rests independently upon the State Constitution, it is, of course, directly parallel to the opinions of this Court which refuse to recognize any concept of continuing jeopardy under the Fifth Amendment, e.g., Kepner v. United States, 355 U.S. 184 (1957); Price v. Georgia, 398 U.S. 323 (1970) (per Burger, C.J.).(4)

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(4)Neither the opinion of the Ninth Circuit, the Petition for Certiorari, nor petitioner's opening brief cite In re James M. Consequently, no discussion is devoted in either

B. The Conclusion that Juveniles are Protected From Double Jeopardy by the State and Federal Constitutions Follows Inexorably From the Entire History of Western Jurisprudence.

That the State Supreme Court should attach a construction to the double jeopardy provisions of the California Constitution equivalent to that which this Court has ascribed to the Fifth Amendment, and that it should also conclude that both provisions are independently applicable to juvenile proceedings, should not come as a surprise. cf. Petitioner's Opening Brief, pages 14-15.

The prohibition against two trials of any one cause has always been an essential part of the jurisprudence of Western man, beginning in ancient Greece, continuing through Roman law and Canon law; by the Thirteenth Century, it had become firmly established in the Common law of England. Bartkus v. Illinois, 359 U.S. 121, at 151-155 (Black, J., dissenting) (1959),

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place to California's general rejection of the concept of continuing jeopardy in juvenile cases.

and the extensive documentation there cited.(5)

It has also been observed by this Court that by the time of Blackstone, the rule that there should only be one trial of a given cause was applied with equal force to both civil and criminal cases:

> ". . . In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause nemo debet bis vexari pro una et eadem causa. . . ."
>
> "(In criminal cases) The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been

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(5) A decade later, the impressive scholarship contained in Justice Black's dissent in Bartkus was instrumental in convincing the Court to apply the bar against double jeopardy to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 795 (1969).

acquitted or convicted." Ex Parte Lange, 85 U.S. (18 Wall.) 163, 168-169 (1873).

As the antecedents of the bar against double jeopardy were evolving, so were the antecedents of the California juvenile court. In 1924, the California Supreme Court noted that California's juvenile courts had evolved directly from concepts of probate jurisdiction, specifically that of parens patriae, which are equally rooted in the law of ancient England.

> "The theory that the State and its instrumentality, the court, is the guardian of all such minors as require its care and protection is of ancient origin, looking back into feudal times in England when the Crown, through the inquisitio post mortem had the matter of the supervision over the estates of minors. . . . /T/he jurisdiction of this court was transferred to the court of chancery through which the King, as we are told by Blackstone, in his capacity of parens patriae, assumed the general protection. . .

> of all infants in his kingdom through the keeper of his conscience, the Chancellor. . . . The doctrine (of parens patriae) . . . thus became a part of the British system of government and of jurisprudence and the jurisdiction of courts of equity thus firmly established in the English law passed to this country upon the establishment of courts of law and equity in its various states. . . ." In re Daedler, 194 Cal. 320, 324-325, 228 P.467, 469 (1924).(6)

No special "prescience" is needed, therefore, to conclude that the concept of double jeopardy and the California juvenile court both evolved directly from roots which were both integral parts of the same corpus juris. Just as the English antecedents of

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(6) An illuminating view of the exercise of pre-juvenile court parens patriae jurisdiction, which by its similarity to modern practice underscores the nonspontaneous origins of the juvenile court, is provided in Ex Parte Crouse, 4 Whart. (Pa.) 9, 11 (1839).

double jeopardy barred multiple litigation of the same contested facts before the Chancellor,(7) so is the modern-day codification of those antecedents found in the federal and state constitutions applicable to the contemporary exercise of parens patriae jurisdiction in the juvenile court.

It is the genius of our Common law system that old principles may be applied to new, but analogous situations as the occasion arises. When reasoning thus by analogy, one can hardly expect the old factual situation to be identical to the new context to which the enduring principle is applied. If it were otherwise, there would be no growth of the law, merely an application of static principles to repetitious fact patterns. As Mr. Justice McKenna once aptly stated,

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave its birth. This is peculiarly true of constitutions.

(7) J. Story, Commentaries on Equity Pleadings, 602-605 (2nd Ed. 1840).

> They are not ephemeral enactments designed to meet passing occasions. Weems v. United States, 217 U.S. 349, 373 (1910).(8)

C. The "Independent State Ground" Doctrine Limits the Scope of the Controversy Herein Almost to its Own Facts.

Petitioner's concession (Petitioner's Opening Brief, page 19) that the California decisions applying the protection against double jeopardy to juveniles rest upon independent State grounds requires the conclusion that the broad federal questions which this case might otherwise present for decision do not constitute a "case or controversy" within the meaning of Article III, Section 2 of the Constitution.

In Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), this Court decided that it had no jurisdiction to review questions of state law which had been

(8) We are grateful to petitioner's counsel for having so ably framed the above paragraph for us at pages 29-30 of his opening brief.

determined by state courts, even though a federal question might also be present in a given case. This conclusion having been reached, it followed easily enough that it would amount to the giving of an advisory opinion for the Court to decide federal questions in a case where the result was controlled by state law, regardless of how the federal issues were resolved. Herb v. Pitcairn, 324 U.S. 117 (1945).

In Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935), the Court stated:

> "(W)here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."

See also Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965); California v. Krivda, 409 U.S. 33 (1972); Aikens v. California, 406 U.S. 813 (1972).

Thus, given the Richard M. and James M. decisions, supra., and the doctrine of the independent nonfederal ground, it becomes apparent that the question remaining for

decision by this Court is an exceedingly, if not excessively narrow one; one which, incidentally, this Court has refused to decide on a very recent prior occasion. Bryan v. Superior Court, 7 Cal.3d 575, 102 Cal.Rptr. 831, 498 P.2d 1079 (1972), Cert. den. sub nom., Bryan v. California, 410 U.S. 944 (1973). That question is whether the narrow exception which the state courts have carved out of their double jeopardy decisions in Bryan and the instant case passes federal constitutional muster.

This exception might be defined as follows:

> On any given charge, assuming (absent waiver) that jeopardy bars a second trial in either juvenile or criminal court where the juvenile has not been found "unfit" and where a final judgment of acquittal or an appealable dispositional order has been entered, is a second trial in criminal court nevertheless permissible where the minor has been found "unfit" at some time after a trial on the merits has begun in juvenile court?

It is worth noting at this point that Section 606 California Welfare and Institutions Code prohibits the trial of a juvenile in criminal court unless he has been found unfit for juvenile court under Section 707. Section 606 contains no guidance, however, as to the stage of the proceedings at which a finding of unfitness may occur, or, for that matter, as to the sufficiency of any evidence which may have been presented up to that point.

Under the anomalous[9] Bryan exception, even if the evidence of guilt was palpably insufficient, it would be entirely possible for the juvenile court to simply declare a minor unfit at any time after the presentation of evidence had begun, prior to the announcement of any verdict, by simply seizing on some incidence of misbehavior in the minor's past, the presence of which is all but inevitable unless the minor has been living in an iron lung. See Donald L. v. Superior Court, 7 Cal.3d 592, 600-601,

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[9] See Note, Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts, 24 Stan.L.Rev. 874, 880-881 (1972).

102 Cal.Rptr. 850, 855, 498 P.2d 1098, 1103 (1972).

Were such a thing to happen, the result would be an injustice easily a dozen times worse than that which might result were a minor required to stand trial twice in juvenile court. Even if he were ultimately acquitted, the minor, upon being found unfit, would be transferred from the ostensibly homelike[10] surroundings of Juvenile Hall to the stark environs of the County Jail. There he could be held for at least 10 days pending a preliminary examination,[11] and then for a minimum of an additional 60 days after the filing of an information.[12] As California law renders minors incapable of disposing of property or of entering into contracts,[13] it is unlikely indeed that the minor would be able to post bail during this time.

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[10] California Welfare and Institutions Code Section 851.

[11] California Penal Code Section 859(b).

[12] California Penal Code Section 1382.

[13] See California Civil Code Sections 25, 33, 211.

The Bryan decision appears to have been based upon pragmatic fears that juvenile judges would declare minors unfit for improper reasons were a different result reached. 7 Cal.3d at 584, 102 Cal.Rptr. at 837, 498 P.2d at 1085. But as we have pointed out above, a different pragmatic problem has simply been substituted, whereby courts may be encouraged to say "unfit" instead of "not guilty" in cases where the evidence is weak, but the Court or prosecutor has a hunch that, given a second chance, enough evidence might be educed to support a conviction.

We do not think that the meaning of the Constitution can be made to change upon fears or presumptions that courts of law are going to act improperly. For, to engage in such a presumption ignores "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile system contemplates." McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

Equally fundamental to the proposition that rules of law ought not to be based on assumptions that courts are going to act improperly is the fact that nowhere in our constitutional system has the

content of fundamental rights been made to turn on invidious ad hominim considerations. For the State Court to hold, in effect, that jeopardy attaches and terminates, respectively, at the beginning and end of a juvenile court trial,[14] unless the minor happens to be an incorrigible little so-and-so, simply will not do. If nothing else, the invidious situation created by the State Court's resolution of the jeopardy issue under its own law raises a serious problem of equal protection of the laws.

But for all the ways in which the Bryan decision might be criticized, it remains that further resolution of the controversy presented herein and in Bryan will have an immediate effect upon perhaps ten individuals within California, aside from respondent Jones.

This is for the reason that, under current practice, virtually 100 percent of all fitness

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[14] It is worth reiterating at this point that the California court has held that jeopardy terminates at the end of trial for purposes of barring the State from appealing. In re James M., supra.; Bryan v. Superior Court, supra., 7 Cal.3d at 583, 102 Cal.Rptr. at 837, 498 P.2d at 1085.

determinations are made prior to trial, at the "very outset" of theproceedings. See California College of Trial Judges, California Juvenile Court Benchbook, Section 10.4 (pp. 190-191) (1971), commended by the California Supreme Court in Donald L. v. Superior Court, 7 Cal.3d 592, 598, 102 Cal.Rptr. 850, 853, 498 P.2d 1098, 1101 (1972). California's actual practice in this respect is typical of what takes place in most American jurisdictions, and conforms to the recommendations of the National Conference of Commissioners on Uniform State Laws. Uniform Juvenile Court Act, Section 34; Rule 9; Model Rules for Juvenile Courts (National Council on Crime and Delinquency, 1969); and see the 15 state statutes cited by petitioner at pages 47-48 of his opening brief.(15)

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(15)We think it neither unfair nor inappropriate to state our opinion, based upon many years of experience with the Los Angeles County Juvenile Court, that this case arises principally because there happens to have been a single juvenile referee in Los Angeles with a documented penchant for touching off appellate brouhahas by taking unconventional and sometimes premptory actions during or at the close of trials. See In re Dana J., 26 Cal.App.3d 768, 103 Cal.Rptr. 21 (1972); Appendix, p. 22; see also generally In re Henry G., 28 Cal.App.3d, 276, 104 Cal.Rptr. 585 (1973).

The practical impact of the Ninth Circuit's opinion upon the ongoing practices of the California Juvenile Court has been slight indeed; it has served only to correct a solitary and isolated deviation from standard practice. Quite contrary to what petitioner suggests at pages 36-45 of his opening brief, no one has supposed that the Ninth Circuit has required any "cumbersome preliminary hearing" to be conducted prior to a fitness hearing. It is doubtless because of the much greater "cumbersomeness"--not to mention unfairness--of having a whole trial before a fitness hearing that California courts have made it the standard procedure to consider fitness prior to trial; and the California legislature has consistently refused to require that the adjudication hearing precede the fitness hearing. Donald L. v. Superior Court, supra., 7 Cal.3d at 597, 102 Cal.Rptr. at 853, 498 P.2d at 1101.

Left undisturbed, therefore, the opinion of the Ninth Circuit changes little; this fact raises in our mind a substantial question of whether a further stirring of the narrow controversy presented herein by this Court would be a provident use of judicial

resources. On the other hand, as we shall develop more fully in Part II, post, a decision on the merits in favor of petitioner, which would have the effect of encouraging juvenile courts to abandon their heretofore preferred practices, would radically alter the status quo; in the process, many of the constitutional concepts which have been considered fundamental in our free society will have been assaulted, and a further blow will have been dealt to the chances for the success of the juvenile court.

II

THE RULE URGED BY PETITIONERS WOULD ALLOW A JUVENILE PROCEEDING TO BE CONVERTED INTO A MERE INQUISITION PRELIMINARY TO A CRIMINAL CASE. THE RESULT WOULD BE DESTRUCTIVE OF THE JUVENILE COURT AND FUNDAMENTALLY UNFAIR TO ALL MINORS WHO APPEAR BEFORE IT, WHETHER THEY ARE "FIT" OR "UNFIT" FOR JUVENILE COURT.

Introduction to the Second Argument

Should petitioner prevail on the merits in this case, there is every danger that juvenile courts in California and elsewhere might change their standard procedure and, freed from any residual doubts as to the constitutionality of such procedure, begin holding large numbers of minors unfit for juvenile court at the dispositional phase of the proceedings, after an adjudication hearing had taken place.

We feel the effect of this would be evil indeed; it would likely destroy any remaining hope that the juvenile court can actually function in the best interest of minors by converting its once paternal and informal hearings into preliminary inquisitions, to

be used to afford unfair advantage to the prosecutor in a later criminal prosecution.

For this reason, minors accused of juvenile delinquency would be severely inhibited from presenting to the juvenile court their explanation of the facts or from calling witnesses in their defense. In short, the result would be a universal distortion of the accuracy of the fact-finding process in juvenile court and a further invidious discrimination against those minors who are later tried as adults, as if a sixteen-year-old facing life in the penitentiary is not under enough of a handicap already.

Mr. Justice Blackmun, in his recent plurality opinion in McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) has observed that, "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence." To this we would add that if the Draconian informalities of the pre-constitutional criminal law are to be allowed to work their way into that system, there is even less of a reason for its continued existence. To

paraphrase John Gay, an open foe--in the form of the State openly pressing criminal charges--may prove a curse, but a pretended friend--in the form of a juvenile judge coaxing information out of an unwary minor for the later advantage of the state in a criminal trial--is far worse. See Spano v. New York, 360 U.S. 315, 323 (1959).

A. As it is Indispensable to Accurate Fact-finding, the Right to Present a Defense to an Accusation of Criminal Conduct is an Essential Element of Due Process.

In its landmark decision in In re Gault, 387 U.S. 1 (1967), this Court held that minors appearing before the juvenile court were guaranteed due process of law. Among other things, the Court specifically included in its concept of due process for minors the traditional Sixth Amendment rights to notice, to the assistance of counsel and to confront and cross-examine witnesses.(16)

The Court has subsequently sharpened and clarified this decision to emphasize that

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(16) There were a total of five opinions written in Gault. While there was considerable divergence throughout these opinions,

the primary concern of the due process clause is the fairness and accuracy of the fact-finding or adjudicatory stage of the proceedings; the Court has, therefore, extended to minors certain rights which it considered essential to accurate fact-finding,[17] while refusing to extend others which were considered nonessential.[18]

It has long been assumed that the rights to notice, counsel and compulsory process contained in the Sixth Amendment form a constellation, the purpose of which is to "permit any individual who was charged with any crime, to prepare his defense. . . ." United States v. Burr, 25 Fed. Cas. 30, 32 (#14, 692d, C.C.D. Va. 1807) (Per Marshall, C.J.).

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they approach unanimous agreement on the proposition that one or more of these Sixth Amendment rights should be afforded to minors. See 387 U.S. at 61 (Black, J., concurring); 64 (White, J., concurring); 72 (Harlan, J., concurring and dissenting); 80-81 (Stewart, J., dissenting).

(17) In re Winship, 397 U.S. 358 (1970); Ivan V. v. City of New York, 407 U.S. 203, 204 (1972). (Proof beyond a reasonable doubt).

(18) McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971). (Jury trial).

At Common law, an accused was denied the right to testify or to call witnesses in his defense; he was defended only by the argument that the case against him had to be completely proved. The theory behind this rule was that if the state presented adequate prima facie proof of quilt, no witnesses or counsel on the other side needed to be attended to; if the state's evidence was insufficient, none were needed. H. Stephen, "The Trial of Sir Walter Raleigh," Transactions of the Royal Historical Society, 172, 184 (4th Ser. Vol. 2, 1919). Needless to say, this primitive rule was ruinous in its effect on the accuracy of fact-finding.

> "Witnesses for the Government may swear falsely and directly to the matter in charge, and until opposing testimony is heard there may not be the slightest doubt as to its truth, and yet, when such is heard, it may be incontestable that it is wholly unworthy of belief. . . ." J. Story, Commentaries on the Constitution of the United States, Sec. 1792 at 548-550 (4th Ed. 1873).

By enactment of the Sixth Amendment, therefore, a proper concern for factual accuracy was injected into a system which had once been content to feel that it was an "honor" to the law that its pristine majesty did not permit the accused to defend themselves; for "respectable" people simply weren't indicted. D. Mellinkoff, The Conscience of a Lawyer, 51-52 (1973).

That one of the Sixth Amendment's purposes was to constitutionalize the fundamental right to a defense has been recognized in many contemporary opinions of this Court. In In re Oliver, 333 U.S. 257, 273 (1948), the Court held that, "failure to afford the petitioner a reasonable opportunity to defend himself. . . was a denial of due process of law. A person's right to reasonable notice of the charge against him, and an opportunity to be heard in his defense. . . are basic to our system of jurisprudence. . . ." Accordingly, in Washington v. Texas, 388 U.S. 14, 17 (1967), the Court held that as the Sixth Amendment right to compulsory process is tantamount to the right to present a defense, it would be applied to

the states through the Due Process Clause of the Fourteenth Amendment. Earlier that year, the same rule had been announced in mental commitment cases which are similar to juvenile proceedings in their parens patriae origins. Specht v. Patterson, 386 U.S. 605, 610 (1967). See also California v. Green, 399 U.S. 149, 176-177 (1970) (Harlan, J., concurring); Chambers v. Mississippi, 410 U.S. 284 (1972) cf. Williams v. Florida, 399 U.S. 78, N.14 at 83 (1970); Wardius v. Oregon, 412 U.S. 470 (1973).

As they are indispensable to the fairness and accuracy of the fact-finding process in a proceeding wherein the minor's liberty is in jeopardy, the rights to testify and to present evidence in one's own defense are fundamental, and are guaranteed to minors through the Due Process Clause of the Fourteenth Amendment.

B. An Impermissible Chilling Effect Upon the Fundamental Right to Present a Defense is Created Where the Minor Must Fear That If He Presents Evidence, It Will Be Used by the Public Prosecutor, Who is Present in the Juvenile Court, to Put Him at a Disadvantage in a Later Criminal Prosecution.

Whether to take the witness stand in one's own behalf or to call a given witness in one's defense always presents an accused and his counsel with a difficult decision. When that decision is further complicated by the consideration that by testifying or calling witnesses, one may be simply feeding ammunition to the prosecutor to use to the minor's disadvantage in a later criminal prosecution on the same charge, the minor is necessarily deterred from exercising his constitutional right to present his version of the facts to the juvenile court.

In California juvenile courts, the District Attorney is generally present during all adjudication hearings. His function there is to "assist in the ascertaining and presenting of the evidence."

Cal. Welf and Inst's. Code Sec. 681.[19] A Deputy District Attorney did in fact appear at the adjudication hearing before the juvenile court in this case. App. pg. 17.

The District Attorney's principal duty, under California law, is to "attend the courts and conduct on behalf of the People all prosecutions for public offenses." Cal. Gov't. Code Sec. 26500. He is charged with drawing all indictments and informations, and with attending sessions of the grand jury and the committing magistrates. Cal. Gov't. Code Sec.'s 26501, 26502. In short, the District Attorney is the criminal prosecutor for the state.

When a minor appears before a California juvenile court, therefore, he also appears

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[19] The participation of the District Attorney in contested adjudication hearings, while ostensibly optional, has been rendered mandatory in contested adjudication hearings by state court decisions. Lois R. v. Superior Court, 19 Cal.App.3d 895, 97 Cal.Rptr. 158 (1971); Gloria M. v. Superior Court, 21 Cal.App.3d 895, 98 Cal.Rptr. 604 (1971); In re Ruth H., 26 Cal.App.3d 77, 102 Cal.Rptr. 534 (1972) (hrg. den. by Cal. Supreme Ct., Aug. 9, 1972).

before the public prosecutor. As he or his witnesses testify, that prosecutor is afforded full knowledge of every detail of minor's defense to the charge. There is nothing to stop him from using this information to gain considerable tactical advantage over the minor at a later criminal trial.(20) It is, after all, incontestable that if one were to go into a criminal trial with the prosecutor knowing in advance every detail of factual evidence possessed by the minor, as well as every turn of legal argument to be presented by counsel, the prosecutor would be in a position to build an abnormally strong rebuttal case, which might prove misleading to the trier of fact in the criminal court. There is also the possibility that, knowing the identity of every person who will testify for the defense,

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(20) In Bryan v. Superior Court, supra., 7 Cal.3d at 586-589, 102 Cal.Rptr. at 839-841, 498 P.2d at 1087-1089, the California Supreme Court held that evidence of a confession or plea of guilty in juvenile court could not be used in a criminal proceeding. No attempt was made to forbid use of the minor's other testimony, nor was any attempt made to prohibit the prosecutor from using what he may learn from a minor to place him at an unfair disadvantage.

overzealous prosecuting authorities might take subtle or not-so-subtle actions aimed at intimidating and discrediting such witnesses. See Reynolds v. Superior Court, 12 Cal.3d 834, NN. 17-18 at 846-847, 117 Cal.Rptr. 437, 445,_____ P.2d____(1974).

This is constitutionally intolerable for the reason that it creates a "chilling effect" upon the exercise of the fundamental right to present a defense; obviously, it also renders a sham any pretense that the hearing is being conducted for the minor's benefit.

In United States v. Jackson, 390 U.S. 570 (1968), the Court held that a portion of the federal kidnapping act which provided that the death penalty could be imposed only by a jury was void for the reason that it inhibited the exercise of the rights to a trial and to a trial by jury:

> "Whatever might be said of Congress' basic objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. (Citations omitted) The question is not whether the chilling

effect is incidental rather than intentional; the question is whether that effect is unnecessary and, therefore, excessive." 390 U.S. at 582.

Similarly, in Shelton v. Tucker, 364 U.S. 479 (1960), a requirement that prospective school teachers list all organizations to which they had belonged or contributed to in the past five years was held void for its chilling effects upon the teachers' exercise of their rights of free speech and association, the Court noting that, "scholarship cannot flourish in an atmosphere of suspicion and distrust." 364 U.S. at 487. See also N.A.A.C.P. v. Button, 371 U.S. 415 (1963) (State regulation of legal profession may not operate to inhibit otherwise lawful pursuit of social betterment through litigation); United States v. Robel, 389 U.S. 258 (1967) (Overbroad regulation banning all members of designated organizations from defense employment held to unduly inhibit exercise of the right of free association.)

More recently, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court, in an

opinion by the Chief Justice, echoed the theory of United States v. Jackson by holding that an employment aptitude test which had racially discriminatory effects could not be used under the Federal Civil Rights Act,(21) where the test did not serve the purpose of separating qualified from unqualified job applicants, even though the discriminatory effects may have been unintentional. Finally, in Chaffin v. Stynchcombe, 412 U.S. 17, N. 20 at 32-33 (1973), the Court, speaking through Mr. Justice Powell, noted that, "/United States v./ Jackson. . . /Is/. . . clear and subsequent cases have not dulled /its/ force."

The unlimited prosecution discovery afforded when a minor testifies or calls witnesses will necessarily inhibit the vigor with which the minor defends himself. He will have to fear that if he does not keep a few trump cards, so to speak, off the table, he will have given the prosecutor everything he needs to obtain a conviction in criminal court.

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(21) 42 U.S.C. 2000e, et. seq.

This will distort the fact-finding process, as the withheld "trump cards" may be just what is needed to create a reasonable doubt in the mind of the juvenile court. It will tend to cause the adjudicative process to resemble a criminal trial as it would have been conducted before the Sixth Amendment, when criminal charges often appeared stronger than the truth because they were not answered. See 2 J. Story, Commentaries on the Constitution of the United States, 550, supra., (4th Ed. 1873).

C. The Uncontrolled and Nonreciprocal Prosecution Discovery Which Would Result If Petitioners Prevail is Also Per Se a Violation of Due Process.

While it has been held that certain forms of prosecution discovery, when carefully controlled so as to insure that the accused is not put at an unfair disadvantage, are permissible, Williams v. Florida, 399 U.S. 78 (1970), no court has ever sanctioned uncontrolled and

nonreciprocal prosecution discovery. In Wardius v. Oregon, 412 U.S. 470 (1973), the Court held that while the due process clause may have little to say about the amount of pretrial discovery which must be afforded, "it does speak to the balance of forces between the accused and his accuser. Cf. In re Winship, 397 U.S. 398. . . ." A footnote then states, "Indeed, the state's inherent information gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." 412 U.S. at 474-475; cf. Reynolds v. Superior Court, 12 Cal.3d 834, 117 Cal.Rptr. 437,____P.2d____(1974), in which the California Supreme Court has refused to sanction any prosecution discovery absent legislation, nor to provide judicially for a system of reciprocal discovery.(22)

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(22)We are led at this point to also recall Mr. Justice Jackson's famous observation that "/A/Common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without ~~witnesses~~ witnesses or on ~~witnesses~~ witnesses borrowed from the adversary." Hickman v. Taylor, 329 U.S. 495, 516 (1947).

In the factual context at hand, were the State to gain unrestricted discovery of the minor's defense, in a juvenile hearing, it would be under no duty to disclose in advance what rebuttal evidence would be presented at the criminal trial. In Wardius, supra., the Court was careful to stress that such reciprocity was the essential underpinning of the ruling in Williams v. Florida. Cf. Rule 12.1, proposed Federal Rules of Criminal Procedure (1974).(23)

Clearly, the standard established in Wardius is violated by the result sought by petitioner.

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(23) That there are substantial interests to be lost upon the enactment of rules permitting even carefully controlled prosecution discovery is shown by the consistent refusal of the California legislature to enact a notice-of-alibi statute, despite repeated attempts dating to the 1930's. The Congress has similarly displayed its concern by holding up approval of the proposed Federal Rules of Criminal Procedure. Reynolds v. Superior Court, supra., 12 Cal.3d at 846-847, NN. 17-18, 117 Cal.Rptr. at 445____ P.2d at____ (1974).

D. As California Appellate Courts Would Not Correct a Miscarriage of Justice Resulting From an Erroneous Finding of Guilt Due to a Withheld Defense, it is Doubly Important That No Inhibition be Placed Upon the Right to Freely Present Evidence.

Matters are made worse by the fact that California appellate courts would not rectify the conviction of an innocent juvenile who withheld his defense in fear of its use against him in a later criminal case. California courts adhere to a unique standard of appellate review,(24) whereby only the sufficiency of the evidence educed by the State will be considered on appeal; the reviewing court will not consider the totality of the evidence, nor decide whether there was proof beyond a reasonable doubt. People v. Newland, 15 Cal.2d 678, 681-682, 104 P.2d 778, 780

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(24) The uniqueness of the California standard of factual review, with comparison to the prevailing rules in other jurisdictions, is discussed in People v. Blum, 35 Cal.App.3d 515, 521-530, 110 Cal.Rptr. 833, 836-843 (1973) (dissenting opinion) Cert. den.____ U.S.____, 94 S.Ct. 2401 (1974).

(1940); People v. Reilly, 3 Cal.3d 421, 425, 90 Cal.Rptr. 417, 419, 475 P.2d 649, 651 (1970); People v. Reyes, 12 Cal.3d 486, 496-497, 116 Cal.Rptr. 217, 223, 526 P.2d 225, 231 (1974). This standard of review has been made applicable to juvenile cases. In re Roderick P., 7 Cal.3d 801, 103 Cal.Rptr. 425, 500 P.2d 1 (1972).

While this case does not directly present an issue of the constitutionality of California's standards of appellate review, their existence makes it doubly important, for purposes of the due process clause, that no condition be created which will prevent cases from being fully tried and accurately resolved before the juvenile court. See McKeiver v. Pennsylvania, supra., 403 U.S. 528, 547 (1971).

E. Conclusion to the Second Argument

Considerations of appellate review apply especially to those who are ultimately not found unfit for juvenile court; however, the effect of the withheld defense on those who are remanded to adult court is equally unfair. Where a minor is forced to

withhold his defense for tactical reasons, he virtually insures his conviction in juvenile court. Moreover, as we have pointed out (Pg. 18 , ante), there is nothing to prevent the juvenile court from simply saying "unfit" instead of "not guilty" in a case where the State presents a weak case, or it appears there is some other legal impediment to the entry of a "guilty" verdict.

With the minor effectively inhibited from presenting a defense, the net effect of the process, therefore, is to afford the prosecutor two bites at the apple of conviction through exploitation of the inherent mathematical advantage provided by trying a given case twice. Note, Twice in Jeopardy, 75 Yale L.J. 262, N. 74 at 278 (1965),[25] cited by the Court in

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[25] "If the evidence were such that one in four (fact-finders) would convict, and three in four acquit, the probability of conviction if the defendant is tried once is, of course, one in four (4/16). If two trials were permitted, the defendant would have to convince two (fact-finders) of his innocence and the probability of one of the two convicting would be 1-(3/4 X 3/4)= (7/16). . . . If one had to convince five (fact-finders) his probability of conviction would rise to over three in four."

Ashe v. Swenson, 397 U.S. 436, N. 10 at 446 (1970); see also Waller v. Florida, 397 U.S. 387 (1970).

That this chilling effect and resultant distortion of the fact-finding process is unnecessary is shown by the near universal practice of the state courts of eschewing it. (Pg.19-20, ante) That it is unnecessary to have a trial on the merits before a fitness determination can be made is also shown by the fact that the primary standard to be applied is the minor's amenability to treatment, not the seriousness of his offense. Jimmy H. v. Superior Court, 3 Cal.3d 709, 714, 91 Cal.Rptr. 600, 603, 478 P.2d 32, 35 (1970); Bruce M. v. Superior Court, 270 Cal.App.2d 566, 75 Cal.Rptr. 881 (1969); Richerson v. Superior Court, 264 Cal.App.2d 729, 70 Cal.Rptr. 350 (1968).

The State's legitimate interests in convicting the guilty are adequately served by one trial; if that trial is to be in criminal court, that determination can be made--as it is in the case of all defendants over age 18--without first trying the case in juvenile court. This being so, the chilling effect upon the fundamental rights

to defend oneself created by the threat of reprosecution in criminal court following a post-trial finding of unfitness are impermissible under the doctrine of United States v. Jackson.

CONCLUSION

For the reasons set out above, Amicus respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

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